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No. 304

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, American Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 2, 1966.

OPINIONS BELOW

The opinions of the panel of the Court of Appeals that initially heard the case and of the court *en banc* on rehearing (App. A, pp. 1a-39a, *infra*) are not yet reported.

The order of the Civil Aeronautics Board that was reviewed in the Court of Appeals (App. C, pp. 42a-44a, *infra*) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App. B, pp. 40a-41a, *infra*) was entered on March 2, 1966. By order entered May 14, 1966, the Chief Justice extended the time for filing a petition for certiorari to and including June 30, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an administrative agency may deprive common carriers holding certificates of public convenience and necessity of a portion of the authority they had under their certificates through the adoption by the agency of a policy statement without an evidentiary hearing, when the relevant statute provides that a certificate can be amended or modified only upon specific findings by the agency after notice and evidentiary hearing.

2. Whether an administrative agency may summarily outlaw, without hearing, tariff filings of common carriers identical to those of a competitor which the agency accepts and allows to go into effect, when the relevant statute provides that rates can be invalidated only upon specific findings by the agency after notice and evidentiary hearing.

3. Whether an administrative agency can eliminate competition among common carriers by a rule adopted without notice to or the opportunity for written submissions of data and views by the competing carriers or the public.

STATUTES INVOLVED

The provisions of the Federal Aviation Act and the Administrative Procedure Act principally involved are set forth in Appendix D hereto, pages 45a-60a, *infra*.

STATEMENT

This case poses questions of vital importance in the regulation of transportation: questions of the integrity of carriers' licenses, of carriers' rights to compete and of shippers' rights to rates reduced by competition. The decision below allows those rights to be denied by an administrative decree promulgated without notice or evidence and enforced without the possibility of effective judicial review.

Petitioners are common carriers by air holding certificates of public convenience and necessity under the Federal Aviation Act authorizing them to engage in air transportation of persons, property and mail between, among other places, points on the two coasts and cities in between. The Slick Corporation and the Flying Tiger Line also are holders of such certificates of public convenience and necessity; their certificates authorize them to engage in the air transportation of property and mail only, over transcontinental routes in competition with petitioners.

The Federal Aviation Act,[1] as did its predecessor the Civil Aeronautics Act of 1938,[2] places common carriage by air under the comprehensive regulation of the Civil Aeronautics Board. A carrier cannot engage in air transportation except pursuant to a certificate of public convenience and necessity, § 401(a), issuable after notice and hearing and on an evidentiary record, §§ 401(c), (d); and such a certificate can be amended or modified only after notice and hearing and on an evidentiary record, §§ 401(f) and (g). Rates must be specified in a tariff, § 403(a), and must be reasonable and nondiscriminatory, § 404. The Board can suspend the effectiveness of tariff changes for periods not exceeding 180 days, § 1002(g), and after notice and hearing and on an evidentiary record, upon finding that a rate is

[1] 72 Stat. 731 (1958), *as amended*, 49 U.S.C. § 1301 *et seq.* (1964).

[2] 52 Stat. 973.

unlawful, can require compliance with the Act, § 1002(c), or itself fix the lawful rate, § 1002(d).

Petitioners' operations began before 1938 when federal economic regulation of air transportation was instituted. Their original certificates of public convenience and necessity—since amended and added to from time to time—were issued under the so-called grandfather provisions of the Civil Aeronautics Act of 1938. The certificates have always included, without restriction, authority to carry property, and petitioners have exercised this authority from the beginning. Since 1944 they have carried air freight in all-cargo freighters as well as in the cargo compartments of their passenger-carrying aircraft.

In 1949, the Board issued temporary certificates of public convenience and necessity to certain other carriers, including Slick and Flying Tiger, authorizing them to carry property only. *Air Freight Case,* 10 C.A.B. 572 (1949). These two carriers have since been authorized to carry mail as well as freight, and their certificates have been made permanent. *Domestic Cargo-Mail Service Case,* 36 C.A.B. 344 (1962); *Airfreight Certificate Renewal Case,* 23 C.A.B. 186 (1956). They have been authorized also to engage in charter operations, including passenger charters; both have done so, Flying Tiger extensively.

These carriers are commonly referred to as all-cargo carriers. There is one other such carrier authorized to engage in domestic air transportation — Airlift International. Its domestic operations are mainly on north-south routes in the east, competitive only to a limited degree with any of the petitioners, Slick or Flying Tiger.

Petitioners and other air carriers authorized to carry both persons and property, often referred to as combination carriers, have developed a very substantial air freight business. The terms of their certificates with reference to property are identical to those of the certificates of the all-

cargo carriers. There has never been any doubt that their certificates authorize them to transport property in freighters. Of the total freight transported in freighter aircraft in domestic air transportation, 64 per cent was transported by the combination carriers in their freighters and 36 per cent by the all-cargo carriers in their freighters in 1963, a recent representative year.

At the time of the actions of the Civil Aeronautics Board that are in question here, the combination carriers had an investment on the order of $400,000,000 in domestic all-cargo service (R. 146, J.A. 82),[3] including $200,000,000 in late-model jet freighters. Their freight facilities include especially designed mechanical loading equipment and other costly ground equipment for the freight business. They are now in the midst of expansion programs involving additional investments of hundreds of millions of dollars in freighters and ground equipment.

Development of the air freight business has taken place under a regime of vigorous competition, in particular among these petitioners, Flying Tiger and Slick on the transcontinental routes, which are the principal cargo routes. Competition has been especially keen for the business of large-scale, regular shippers and of air freight forwarders, who combine small lots into large shipments. A weight-break system has long been incorporated in freight tariffs to appeal to these classes of shippers; under this system, the charge per pound is graduated downward as weight of shipment increases. Also, the carriers have set up systems for reserving space in advance of flights,

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[3] Citations to the record certified by the court of appeals are designated "R." Parallel citations to the joint appendix filed in the court below, designated "J.A.," are included because petitioners are furnishing nine (9) additional copies of the Joint Appendix for the convenience of the Court. References to the unprinted record in the Board's proceeding are designated "Unprinted Tr." The unprinted record has been filed in this Court.

which principally benefit large-scale, regular shippers and forwarders.

In the fall of 1963, the economies and efficiency of jet passenger aircraft were beginning to be manifest. The introduction by the combination carriers of jet freighters with promise of the same economies and efficiency was imminent. The all-cargo lines had not ordered jet freighters.

At this point the all-cargo lines proposed the abandonment of the competitive regime for air freight business. They presented to the Board, *ex parte,* what came to be called the White Paper. (Unprinted Tr. 1066.) This was a document that called for "a delineation of the roles" of the combination carriers and the all-cargo carriers. Under the suggested delineation of roles only the all-cargo carriers would have been permitted to carry freight in freighter aircraft; the combination carriers would have been limited to the carriage of whatever freight could be handled in their passenger aircraft.

On January 23, 1964, shortly after the *ex parte* presentation of the White Paper, but without reference to it, the Board published a notice of proposed rulemaking, dealing principally with amendments to the Board's regulations governing passenger and cargo charter trips. (R. 179-92, J.A. 115-28.) Included in the notice was a wholly unrelated proposal to add a hortatory section to a part of the Board's regulations that is styled Statements of General Policy. This addition was entitled, "Pooling arrangements of certificated air carriers"; it would have stated merely that "it is the policy of the Board to permit the all-cargo carriers to sell blocked space at wholesale rates to such combination carriers as may choose to do so to provide service between the certificated points of the combination carrier involved." (R. 192, J.A. 128.)

Blocked space means an arrangement, under which a person buys space from a carrier for the carriage of

freight over a period and pays for it, at a discount, whether he uses it or not. The Board's stated purpose was to encourage the combination carriers to make use of the all-cargo carriers in the combination carriers' freight business, the combination carriers selling to shippers at their regular rates and then having the freight transported on the all-cargo carriers' freighters in blocked space purchased by the combination carriers at a lower "wholesale" rate. (R. 186, J.A. 122.) The combination carriers also would continue to transport freight in their own freighters.

Written comments on the proposed amendments to the charter regulations and on the proposed new statement of policy were invited. These petitioners, noting that the formal rulemaking notice spoke of a purpose "to delineate the roles of the all-cargo . . . carriers" (R. 179, J.A. 115), included in their comments arguments that, if the Board intended the proposed policy statement as a step toward eliminating the combination carriers from the bulk cargo business, as proposed in the White Paper, the ultimate goal of elimination could not be achieved legally under the procedure the Board was following. (R. 194-95, 196-97, J.A. 130-31, 132-33.) Moreover, they challenged as untrue, unproved, or at best misleading in view of the introduction of jet freighters, the one factual allegation the Board made in support of its proposed statement — that "all-cargo services of the combination carriers have been operated at substantial losses." (R. 186, J.A. 122; Unprinted Tr. 819-21, 965-67, 1120-21, 1632-33, 1672-74, 1792-93.)

After having received these and other comments, the Board gave notice that it would hear oral argument in the rulemaking proceeding. (R. 201-04, J.A. 137-40.) The Board listed seven questions to which it wished the argument to be addressed. Six of these related to the proposed amendments to the charter regulations, not pertinent to this case. The seventh restated in interrogatory form the statement of policy the Board had proposed in its notice:

whether it should be the Board's policy to permit all-cargo carriers to sell blocked space at wholesale rates to combination carriers. But it added a wholly new question: whether the all-cargo carriers should "be permitted to sell blocked space at wholesale rates to air freight forwarders and other large volume shippers." (R. 204, J.A. 140.)

The blocked space question thus became something quite different from the question that had been posed in the notice of proposed rulemaking. How different was not made clear. The proposed policy statement itself was not republished in any amended form, and there was no indication how far the Board meant to go in depriving the combination carriers of their historic certificate authority to carry freight on equal terms with the all-cargo lines—if indeed it intended this at all.

There was no opportunity to explore this significant new proposal in writing, as its nature required; even if the Board's notice did not imply the possibility of an exclusive privilege for the all-cargo carriers, the offering of reduced rates based on aggregating shipments pursuant to a contract, while not novel, raised issues of fact and law not raised by intercarrier pooling arrangements, which had been the subject of the original rulemaking notice. See *Deferred Airfreight Case*, 23 C.A.B. 651, 665-71 (1956). The Board depended wholly upon a two-hour oral argument for enlightenment on the new question it posed; all of the combination carriers together were assigned but 45 minutes to make their presentation. (Unprinted Tr. 1882.) The argument was heard on July 9, 1964.

A month earlier, Slick had filed for effectiveness July 20 what it styled a blocked space tariff, establishing substantial discounts for shippers who purchased blocked space. (R. 122-23, J.A. 58-59.) The petitioners and Flying Tiger filed complaints, alleging that the Slick tariff was unlawful under the ratemaking provisions of the Federal Aviation Act and asking that it be suspended and

subjected to an evidentiary hearing. (R. 125-26, J.A. 61-62.)

The petitioners also filed defensive blocked space tariffs of their own. (R. 122-23, 129, 156, J.A. 58-59, 65, 92; Unprinted Tr. 158-77, 205-25, 238-58.) Flying Tiger did not make a defensive filing. It said that the Slick rates were so unreasonably low that it would rather suspend operations and conserve its resources than match them. (R. 82, J.A. 17.) On July 17 the Board entered an order placing the Slick tariff and that of petitioner TWA, which had been the first of the petitioners to match Slick, under investigation and suspending the effectiveness of both of them. (R. 122-28, J.A. 58-64.) On July 27 it acted similarly with respect to the defensive blocked space tariff of petitioner American. (R. 129-31, J.A. 65-67.)

On August 7 the Board, in its rulemaking proceeding, adopted and made immediately effective what it termed a Statement of General Policy. (R. 138-44, J.A. 74-80.) In a preamble, the Board recited that it had "concluded to adopt a policy approving the *exclusive* right of all-cargo carriers to sell blocked space to combination carriers, air freight forwarders, and large volume shippers." (Emphasis supplied.) (R. 139, J.A. 75.) Then the statement, now headed "Blocked Space Service," proceeded with provisions that looked not at all like the statement of policy that had been proposed and on which comments had been received. The statement as adopted defined blocked space service; stated that it was the Board's policy to permit the all-cargo carriers to provide blocked space service not only to combination carriers but also to forwarders and large volume shippers; and added that "it is the policy of the Board not to permit combination carriers to provide blocked space service." 14 C.F.R. § 399.37. (R. 144, J.A. 80; App. D, p. 61a, *infra*.) Two of the five members of the Board dissented. (R. 145-52, J.A. 81-88.)

In promulgating this Statement of General Policy, the Board for the first time cited Section 416(a) of the Federal

Aviation Act, which empowers it to "establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require . . . ." (R. 139, J.A. 75.) Section 416(a) had not been invoked in the notice of rulemaking. (The Board there had mentioned only Section 401, under which the Board has authority to regulate charter flights, the principal subject of the original notice (R. 179, J.A. 115); action on the proposed charter regulation amendments was deferred when the policy statement was promulgated (R. 139, J.A. 75).)

The Board's policy statement did not relate to a new kind of service or a new concept, although it purported to define "blocked space service." Indeed, Slick had argued in defense of its blocked space tariff before the policy statement was issued that "the blocked space concept actually has a long history" and that there was "nothing unique" about it. (R. 70-71, J.A. 5-6.) The combination carriers—and the all-cargo carriers—for years had permitted shippers to reserve space daily or several times a week, or on whatever basis their needs dictated, and the weight-break system afforded a discount for volume shipments. The Board's policy statement decreed that the all-cargo carriers could offer an additional discount in consideration of the shipper's agreement to pay for space for recurring shipments over a period of time.

On the same day that the policy statement was issued, the Board vacated the suspension of Slick's tariff but not those of TWA and American (R. 131-33, J.A. 67-69), and later, on August 10, it suspended and ordered an investigation of petitioner United's blocked space tariff, which was the last filed (R. 156-58, J.A. 92-94). This meant that the Board was going to have a hearing concerning the legality of all the tariffs, but while the hearing was in progress only the Slick tariff would be in effect.

But then on August 11 the Board decided that the new policy statement empowered it to reject the tariffs of the

petitioners rather than merely to suspend their effectiveness. (R. 158-60, J.A. 94-96; App. C, pp. 42a-44a, *infra*.) In an order of that date, the three-man majority of the Board, over the dissents of two members who sharply questioned the legality of the action being taken, said:

> "American, TWA and United are combination carriers as contemplated in this regulation and without authority to provide blocked space service. It follows, in view of this determination, that the tariffs of American, TWA, and United are inconsistent with the regulations of the Board as well as with the provisions of section 403 of the Federal Aviation Act of 1958. Consequently, we will herein reject [the] block space tariffs of American, TWA, and United as unauthorized by section 403 of the Act and the provisions of the Board's regulations." (R. 159, J.A. 95; App. C, pp. 42a-43a, *infra*.)

The difference between rejection and suspension is critical. Suspension is limited by the statute to no more than 180 days and is solely for the purpose of permitting the Board to investigate a tariff or tariff provision in an evidentiary proceeding to determine its lawfulness. § 1002(g). But a tariff that is rejected is void. § 403(a). Accordingly the Board ordered the tariffs of the petitioners removed "as an issue" from the rate investigation; the rate case would proceed only as to Slick's tariff. (R. 159, J.A. 95.) Peremptorily the petitioners' tariffs were invalidated.

Thus a statement of general policy, which had been proposed as a mere indication to the carriers that the Board would look with favor on certain pooling arrangements between all-cargo and combination carriers, was suddenly given the effect of depriving the combination carriers of the authority to engage in the freight business on a blocked space basis, while at the same time the competing all-cargo carriers had that authority. No certificate amendment proceedings, no rate proceedings, had been held; nothing had been done except to adopt, in the manner we have described, a Statement of General Policy.

The petitioners petitioned for review of the order of rejection in the Court of Appeals. They argued that the Board had amended or modified their certificate authority without the notice and hearing required by Section 401(g) of the Federal Aviation Act and had acted illegally in the exercise of its power over rates by preventing petitioners from filing tariffs equivalent to the tariff of a competitor and by doing so without notice and hearing, and had not complied with Section 4 of the Administrative Procedure Act in the rule-making proceeding in which the policy statement that was the basis for its action had been adopted. A division of the Court of Appeals agreed with petitioners on their first ground of challenge and issued an opinion, with one dissent, setting aside the Board's order. (App. A, pp. 1a-12a, *infra.*) Petitions for rehearing *en banc* were filed by Slick, which had intervened in the Court of Appeals, and by the Board. The Slick petition was denied, but the Board's petition was granted, and on rehearing the court *en banc* decided, 5 to 3, to affirm the Board's action in rejecting petitioners' tariffs. (App. A, pp. 13a-39a, *infra.*) The court held that the Board could act as it had, following the procedure that it had, because its action was directed at a class of air carriers and not at individual carriers. It distinguished on that ground this Court's decision in *CAB* v. *Delta Air Lines,* 367 U.S. 316 (1961), holding that notice and evidentiary hearing must precede modification of an air carrier's certificate. The court relied upon the existence of a supposed "malaise" in the administrative process brought about by " 'too rigidly' " applying statutory requirements for notice and evidentiary hearing to licensing cases.

• • •

Subsequent to the filing of the petition for review in the lower court there have been these developments:

With the permission of the Board, Slick has suspended its common-carrier freight service, CAB Order Nos. E-22588, Aug. 27, 1965; E-23352, Mar. 14, 1966, and has

taken steps (not yet consummated) to dispose of that part of its operations to Airlift International, the third domestic all-cargo carrier, see Joint Application of Airlift International, Inc. and The Slick Corporation for an Exemption, CAB Docket No. 17341, May 18, 1966.

Despite its initial distaste for the Slick blocked space tariff, Flying Tiger later filed a blocked space tariff. Thus it has an absolute blocked space monopoly. As a monopolist, Flying Tiger has tailored the blocked space concept to its own interest.

Slick's original blocked space tariff was accompanied by an amendment to its existing air freight tariff by which Slick in effect ceased holding out to carry shipments of less than 200 pounds. Although Slick's small-package business was minuscule, Slick asserted that its relinquishment of that business distinguished its tariff from the tariffs of petitioners. (R. 91, 100, J.A. 26, 36.) Flying Tiger's tariff does not provide for any such abandonment of small-package service.[4]

Slick's original tariff required a shipper to designate the particular flights on which he was contracting for space. Recently, Flying Tiger has revised its tariff to permit a shipper, instead of specifying the flights or even the days of the week on which space is reserved, to specify only the number of reservations to be made during the course of a week. The revisions also reduced the spread between blocked space rates and ordinary rates so that for a large proportion of blocked space business the rates are just

[4] The court below noted the point that Slick had made, saying that the petitioners' tariffs were "similar to but not identical with Slick's . . .." (App. pp. 14a-15a, *infra*). The Board, however, said that TWA's original filing, "not different from those of the other petitioners, "essentially matches Slick's." (R. 123, J.A. 59; see also R. 129, 156, J.A. 65, 92). And now there is no longer even a theoretical difference in this respect between the tariff of petitioners' only transcontinental all-cargo competitor and their rejected tariffs.

3 per cent less than ordinary general commodity rates. The Board permitted these revisions to go into effect, over complaints that they departed altogether from the blocked space concept.[5]

REASONS FOR GRANTING THE WRIT

The Civil Aeronautics Board deems this case to be one in which "the question of administrative law presented is of major importance to the administration of the Federal Aviation Act and other similar regulatory statutes . . .." (R. 253.) Thus the Board spoke when it petitioned the court below for a rehearing *en banc*.

That judgment of the Board is abundantly warranted. The question presented concerns the power of an agency, by decree adopted without notice and hearing or even observance of the minimal procedural requirements for lawful rulemaking, to deprive holders of common-carrier licenses of a part of their license authority and thereby prevent them from competing for business by matching a competitor's reduced rates.

The action taken by the Board in the exercise of this assumed power is of great importance for its present and potential effect upon the air freight business,

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[5] The Board had said that "blocked space arrangements would appear to provide a means for obtaining better planning on the part of carriers as well as shippers." (R. 142, J.A. 78.) A carrier left to guess on which days its big shippers will use its services is in no better position to plan than a carrier without any effective blocked space tariff. Hence the blocked space concept is merely a facade by which the Board permits Flying Tiger to offer lower quantity rates than its competitors are entitled to meet.

The Board has followed its decision in the order under review by rejecting as blocked space tariffs not authorized to combination carriers tariffs that have been filed by combination carriers to match Flying Tiger's tariff and its various revisions. CAB Order Nos. E-21575, Dec. 10, 1964; E-21820, Feb. 19, 1965; E-23127, Jan. 18, 1966; E-23653, May 9, 1966.

which is today perhaps the nation's fastest-growing business. The hundreds of millions of dollars invested and now being invested by the petitioners and the other combination carriers in air freight service give point to forecasts that, as has happened in other modes of transportation, in the foreseeable future transportation of freight by air will surpass passenger transportation in importance. (See Dissenting Op., App. A, p. 38a, *infra*.) The Board's action has resulted in a single carrier's enjoying a monopoly of a reduced-rate service on the transcontinental routes, the most important air freight market. By the Board's decree shippers are denied the benefits of competition, and shippers in cities not served by Flying Tiger are denied altogether the benefits of the reduced rates.[6]

Doctrinally the decision below sustaining the Board's assumption of power has significance far beyond the air freight business. It affects the Board in its entire administration of the Federal Aviation Act and other federal agencies in their administration of similar regulatory statutes. The decision is in conflict with decisions of this Court affirming that a regulated firm's license authority, on the basis of which it makes its investments in licensed activities, cannot be modified without strict observance of congressionally prescribed safeguards. The decision also runs directly counter to the established principles that carrier rates are subject to cancellation by an agency only on findings made on an evidentiary record and that competing carriers may meet one another's rates. Finally, the decision is in the teeth of the provisions of the Administrative Procedure Act that specify how agencies are to go about making rules.

1. (a) In landmark decisions this Court has been insistent that administrative agencies may modify the licenses

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[6] A former member of the Board has stressed the importance in the airline industry of the "free play of competitive forces." Hector, *Problems in Economic Regulation of Civil Aviation in the United States*, 26 J. Air L. & Com. 101 (1959).

that set forth the basic authority of the persons they regulate only pursuant to procedures specifically sanctioned by Congress.

The Court's concern with the integrity of a license is fully justified. Investments aggregating in the billions of dollars have been made by regulated enterprises in reliance upon license authority. The license is the keystone of the typical federal regulatory scheme. The statutes under which licenses are required also confer on agencies drastic power to regulate the exercise of the authority, such as the power to regulate rates. And the power of an agency, by rulemaking, to enforce various substantive provisions of its statute is extensive. See *American Trucking Ass'ns* v. *United States,* 344 U.S. 298 (1953); *FPC* v. *Texaco, Inc.,* 377 U.S. 33, 42 n. 12 (1964). The sweep of this power to regulate licensees, respecting which the Federal Aviation Act is notable, no doubt contributes to this Court's insistence that agencies not transgress upon the scope of license authority without following the notice and hearing procedure specified by Congress, with its assurance of effective judicial review.

Section 401(g) of the Federal Aviation Act provides that the Board may "alter, amend, modify, or suspend" an air carrier's certificate of public convenience and necessity only after notice and hearing. Here the Board modified petitioners' certificates without following Section 401(g) procedures. It decreed that as a result of a policy statement adopted without notice and concededly without an evidentiary hearing the petitioners were "without authority" to provide what it called blocked space service; prior thereto they had had such authority. (R. 159, J.A. 95; R. 255.) The fact that the Board did not physically rewrite the license instruments held by petitioners is immaterial, as this Court has held. If, by the adoption of a rule, the scope of a licensee's authority under an existing license is altered, there is a modification of the license that can be effected validly only if the agency complies with the procedure that Con-

gress has prescribed for license modification. *FCC v. National Broadcasting Co.* (*KOA*), 319 U.S. 239 (1943).

In affirming the Board's action in modifying petitioner's certificates without following the prescribed procedure the court below has decided an important question of federal law in a way contrary not only to this Court's decision in the *KOA* case but also to its decisions in *United States* v. *Seatrain Lines,* 329 U.S. 424 (1947), and *CAB* v. *Delta Air Lines,* 367 U.S. 316 (1961).

In the *Delta* case a trunk air carrier had been granted a license by the CAB that permitted a measure of competition between it and a carrier of another class, a local-service carrier. Such a grant was subject to reconsideration upon timely petition. A timely petition to reconsider was filed before the effective date of the license. Prior to that date the Board entered an order reserving jurisdiction later to determine the pending petition to reconsider. Shortly after the effective date of the license it reconsidered, altered the license so as to reduce the authorized competition, and in doing so found that the alteration would have minimal adverse impact on the trunk carrier. The hearing record upon which the license had been granted was still fresh, and the alteration was based on that record. Nonetheless the Court held that, once effective, the license could be modified only after notice and a new hearing under Section 401(g) of the Federal Aviation Act.

The Court declared that "'the specific instructions set out in the statute should not be modified by resort to such generalities as 'administrative flexibility' and 'implied powers.'" 367 U.S. at 325. This view rested not only upon the language of the statute but also upon the legislative history of the Civil Aeronautics Act, the predecessor of the Federal Aviation Act, showing that "Congress was vitally concerned with what has been called 'security of route'—*i.e.,* providing assurance to the carrier that its investment in operations would be protected insofar as reasonably pos-

sible." *Id.* at 324. And apart from considerations peculiar to the Federal Aviation Act, the opinion noted that in *United States* v. *Seatrain Lines, supra,* the Court had spoken "in general terms of the rule that supervising agencies desiring to change existing certificates must follow the procedures 'specifically authorized' by Congress and cannot rely on their own notions of implied powers in the enabling act." *Id.* at 333-34. Pointedly the Court admonished that "arguments to the effect that 'this is just another way of doing it' will not prevail." *Id.* at 333-34 n.15.

(b) Both the Board itself and the court below treated the Board's action as a modification of license authority and not as regulation of conduct thereunder. In its critical order rejecting their tariffs the Board stated expressly that petitioners were "*without authority* to provide blocked space service." (Emphasis supplied.) (R. 159, J.A. 95.) The court in affirming the rejection did not even cite the *American Trucking* case, the leading precedent supporting agency action by rulemaking to regulate the exercise of license authority. And the course of the Board's procedure reveals that it was perforce modifying authority and not merely regulating its exercise.

The Board's purpose was to create a monopoly of blocked space service in the hands of all-cargo carriers. That purpose could not be achieved by any lawful regulation of its licensees' conduct under their licenses, *i.e.*, of the rates that they could charge for services rendered, although the Board initially attempted to use its rate regulation powers to accomplish its policy goal. When petitioners filed blocked space tariffs to match the Slick tariff, the Board placed them under investigation, instituting a rate case in which there would be an evidentiary hearing, and suspended their effectiveness, all as authorized by statute. (R. 122-28, 129-31, 156-58, J.A. 58-64, 65-67, 92-94.) Slick's tariff was also placed under investigation and was initially suspended.

(R. 122-28, J.A. 58-64.) But, when the blocked space policy statement was issued, Slick's suspension was lifted. (R. 131-33, J.A. 67-69.)

This course meant that, while Slick's tariff would go into effect immediately, the petitioners' tariffs also would go into effect in 180 days—the maximum suspension period—unless the rate case was concluded in the meanwhile and petitioners' tariffs were found to be unlawful. But if petitioners' rates were found unlawful the illegality would infect Slick's rates also, and all would have to be cancelled. Under the ordinary statutory requirement that rates be reasonable and nondiscriminatory, as among competitors a given rate could not be lawful for one and unlawful for the others, in the absence of differences among the carriers' costs of providing service of a kind that has not been suggested here. *New York Central R.R.* v. *United States*, 99 F. Supp. 394, 398 (D. Mass. 1951), *aff'd per curiam*, 342 U.S. 890 (1951). And see *Texas & Pac. Ry.* v. *United States*, 289 U.S. 627, 636 (1933); *Air Freight Forwarder's Ass'n*, 8 C.A.B. 469, 472 (1947); *Air Freight Rate Investigation*, 9 C.A.B. 340, 350 (1948). This is true to a large extent even in the case of intermodal competitors under this Court's decision in *ICC* v. *New York, N. H. & H. R.R.*, 372 U.S. 744 (1963). Obviously, therefore, the Board could not accomplish its policy purpose by exercise of its power to regulate rates.

The Board's policy was based on its assertion (with no evidentiary support) that there would not be enough business from large, regular shippers (and forwarders) to permit all the carriers to operate at the reduced blocked space rates. (R. 142, J.A. 78.) Thus it faced a problem of rationing business among competing aspirants—a problem for the solution of which Congress provides licensing procedures. *Cf. Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

But the problem could not be treated as one of initial licensing. The existing licenses of all the carriers already authorized them to engage in the business in question. (R. 255.) All included unrestricted cargo authority in identical terms and, as Slick said, there was nothing unique in the concept of selling cargo service on a blocked space basis. (R. 71, J.A. 6.) All the carriers had always reserved space for shippers. In the passenger business a charge for an unused reservation was a familiar device. And certainly nothing in their licenses prevented either the all-cargo carriers or the combination carriers from reducing rates.

The Board therefore determined to treat the case as involving a type of "service"—blocked space—that the all-cargo carriers' licenses authorized, but that the verbally identical licenses of the combination carriers did not authorize because of the modification effected by the policy statement. Thus it enabled itself summarily to reject the petitioners' tariffs, creating an all-cargo carrier monopoly of the "service" it had defined.

(c) The reasoning of the court below in sustaining the Board's action raises grave questions as to the integrity of licenses of regulated firms and the ability of agencies by fiat to create monopolies of important segments of the enterprises they regulate. The court held that an agency may modify licenses without observance of the procedural safeguards that Congress has prescribed as long as it is dealing with all its licensees or fairly defined "classes" of them. This is novel indeed, without a shred of support in prior decisions of this Court or in the provisions of the Administrative Procedure Act on which the court relied.

The court started with this Court's well-established doctrine that a licensing agency may prescribe, by rulemaking, specific standards, within the ambit of the general statutory standards governing licensing ("public convenience and necessity," etc.), to be met by applicants for licenses, which

if not met permit the agency to refuse to entertain the applications. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964).

But the case here was not an instance of a threshold refusal to entertain a license application failing to meet prescribed standards. Both the combination carriers and the all-cargo carriers already had unrestricted authority under their licenses to transport freight, and the tariff rates and rules under which it would be carried were subject only to the rate regulation power of the Board.

The court below brushed this aside as a "fortuitous" circumstances. (App. A, p. 21a, *infra.*) *Storer* and *Texaco* it thought, would warrant the imposition by rulemaking of restrictions on existing authority exactly as they warrant placing limitations, by rulemaking, on authority that may be applied for. Only one decision of this Court was cited for this reading of *Storer* and *Texaco;* that decision was in a case long antedating either of them, *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943). But in that case the challenge was to the substantive power of the FCC to promulgate its chain-broadcasting regulations, *id.* at 209-10, which had been the subject of exhaustive hearings in which sworn testimony was taken, *id.* at 204-05. As this Court said, there was "no basis for any claim that the Commission failed to observe procedural safeguards required by law . . . ," *id.* at 225. Moreover, the chain-broadcasting regulations there involved did not by their own force modify any outstanding license; exactly like the regulations at issue in *Storer* and *Texaco,* they set up standards for passing on future applications.[7] Indeed, a week

[7] The court below said that the chain-broadcasting regulations required some radio station licensees to change their business practices "to avoid revocation or at the very least non-renewal of licenses." (App. A, p. 20a n.12, *infra.*) Under the scheme of licenses of limited duration that prevails under the Communications Act an applicant for renewal stands on the same footing as

after the *National Broadcasting* decision was handed down this Court held in *FCC* v. *National Broadcasting Co.* (*KOA*), 319 U.S. 239 (1943), that a radio station licensee for a frequency that, at the time the license was issued, was a clear channel under the Commission's rules was entitled to the benefit of the statutory procedures for modification when the Commission undertook to subject the frequency to interference by a change in the clear-channel rules made in a rulemaking proceeding.

The distinction between the *National Broadcasting* and *KOA* cases is the difference between rulemaking limiting the terms of a license that may be applied for—which is permissible—and rulemaking limiting authority already possessed—which is not permitted where, as in this case, a statute requires a hearing before a license is modified. This distinction is not "fortuitous" as the court below said. It has been strictly adhered to both by the FCC and by the courts in reviewing FCC decisions; this adherence is illustrated by another of the cases invoked (somewhat uncertainly) by the court below for its novel proposition, *Trans-*

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an original applicant, so that a regulation that seps up standards for renewal is not a modification of an existing license. As for revocation, it is true that the Communications Act provides that a station license may be revoked for reasons that would warrant the Commission's refusal to grant a license. See Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 415 (1942). But the chain-broadcasting regulations by their own force did not revoke in part or modify any station licensee's authority. Upon disclosure of a failure to comply with the regulations the statutory procedures for revocation could have been invoked, but they would have had to be pursued before revocation was effective. Indeed, in the *Columbia Broadcasting* case, which held the chain-broadcasting regulations immediately reviewable, the Court ruled that they were reviewable under the section of the Communications Act providing for suits to enjoin orders of the FCC other than orders for, among other things, grant, denial or modification of radio station licenses. The reason was that "the Commission's order neither grants, denies nor modifies any license . . .." 316 U.S. at 416.

continent Television Corp. v. *FCC*, 308 F.2d 339 (D.C. Cir. 1962).[8] The other two cases cited by the court are discussed in the margin.[9]

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[8] See also, *e.g.*, Pacific FM, Inc. v. FCC, D.C. Cir. No. 19710, decided April 14, 1966; The Goodwill Stations, Inc. v. FCC, 325 F.2d 637 (D.C. Cir. 1963).

[9] Airline Pilots Ass'n v. Quesada, 276 F.2d 892 (2d Cir. 1960), upheld the validity of a rule barring pilots over 60 from flying scheduled aircraft. That rule was promulgated by the Administrator of the Federal Aviation Agency, whose actions respecting existing licenses are not subject to § 401(g) of the Federal Aviation Act and who has broad powers to act summarily in the interest of safety; the rule was applied to pilots whose licenses specifically provided, as the dissenters below pointed out, "that their duration was as set out in current regulations." (App. A, p. 35a, *infra*.) The case is, as the dissenters said, "even less apposite" than the decisions of this Court upon which the majority of the court below relied. *(Ibid.)*

In Capitol Airways v. CAB, 292 F.2d 755 (D.C. Cir. 1961), a "blanket exemption" for military business had been issued under § 416(b) of the Act for a limited term applicable to all air carriers. Section 416(b) authorizes the Board to exempt carriers from, among other things, the certificate requirement of § 401. Exemptions can be granted or denied and, so far as the statute is concerned, modified or revoked without a hearing. The Board allowed the "blanket exemption" to expire and by rulemaking substituted a policy of entertaining individual requests for exemptions to perform operations for the military. The Court of Appeals upheld the Board's action; all that was decided was that the petitioners in that case were not entitled to an evidentiary hearing on their applications for renewal of the blanket exemption. Petitioners' argument proceeded on the assumption that they had license rights to provide the service covered by the exemption order that could not be suspended or modified without an evidentiary hearing; their contention was that the Board likewise could not refuse to renew those license rights without an evidentiary hearing. The court rejected this contention. It did not have to reach and did not reach the petitioners' assumption, which alone might be relevant to this case.

Some air carriers do not have certificates but operate wholly pursuant to § 416(b) exemption. Even in the case of such car-

Nonetheless the court below held that the critical question is whether agency action singles out one person for treatment or is applicable to all within its jurisdiction or a reasonable class thereof. In the former case, the court said action is "adjudication" under the Administrative Procedure Act; if it is the latter and if it looks to the future it is "rulemaking" under the Administrative Procedure Act. Since here the Board modified the authority of a class of carriers for their future operations and did not confine its modification to a single carrier, it was concluded that the case was one for "rulemaking" under the Administrative Procedure Act. In fact the lower court went so far as to insist that "adjudication" must be not only "individual in impact" but also "condemnatory in purpose." (App. A, p. 25a, *infra.*) Anything else is "rulemaking."

This grossly misreads the Administrative Procedure Act. For that statute defines "licensing" to include the modification of a license, and "adjudication" includes licensing. §§ 2(d), (e). That the combination carriers suffered a modification of their license authority cannot be gainsaid; only so could their tariffs be "rejected." The Board's action was Administrative Procedure Act "adjudication."

Armed with its novel distinction between the one and the several, the court below blandly disposed of the *Delta* case on the ground that the " 'security of route' principle" so emphasized in this Court's opinion gives protection to a carrier only against agency action "addressed against it individually . . . ." (App. A, p. 26a, *infra.*) But there is

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riers the Court of Appeals for the Ninth Circuit has said that if by certain Board regulations the terms of exemption authority were changed in a manner adverse to exempted carriers "adjudicatory proceedings were necessary, and since none were had the regulations would be invalid . . .." Great Lakes Airlines v. CAB, 291 F.2d 354, 366 (9th Cir. 1961), *cert. denied,* 368 U.S. 890 (1961). See also CAB v. American Air Transport, 201 F.2d 189 (D.C. Cir. 1952), *certified question dismissed,* 344 U.S. 4 (1952).

not the slightest suggestion in the *Delta* opinion that the Court's concern with the security of air carriers' routes was dictated by the fact that only a single carrier was involved. Section 401(g) does not distinguish between modification of one carrier's certificate and modification of the certificates of a group of carriers. Surely the broadax is no less dangerous than the scalpel.

The reasoning of the court below would validate a decree by the Board, in the form of a "policy statement," that only all-cargo carriers can carry freight in freighter aircraft, the goal of the all-cargo carriers' White Paper. It thus puts it in the power of the agency to create by fiat a monopoly in a whole segment of air transportation, wiping out the combination carriers' investment in all-cargo service that is now mounting toward a billion dollars. In precisely the same way the decision below would validate a Board fiat that only one group of carriers could provide coach passenger service. Or the Board by fiat could determine that only local-service carriers, and not trunk carriers, could provide turn-around service, passenger or cargo, between cities less than a given distance from each other. Compare *CAB* v. *Delta Air Lines,* 367 U.S. 316 (1961).

And the decision below has an impact reaching beyond air transportation. The procedures of the FCC, carefully geared to the rule of the *KOA* case, could be revolutionized. So of the ICC and the FPC. The license, which is the foundation for investment in regulated areas of the economy, would become sheer sand whenever an agency's opinion writers could find a policy for all or a class of licensees, a task that on the lower court's view requires very little ingenuity.

Nothing in what the court below referred to as the "malaise" of the administrative process justifies the

Board's procedure here.[10] The court was influenced by Dean Landis' suggestion that initial licensing involves functions "more truly planning than adjudicatory," which have been "forced too rigidly into the latter mould." Landis, *Report on the Regulatory Agencies to the President-Elect* 18 (1960). (App. A, p. 24a, *infra.*) But this Court's decisions in *National Broadcasting, Storer* and *Texaco* offer abundant opportunity for agencies to engage in policy planning by setting up standards that must be met at the threshold by license applicants. Similarly, the reference in the decision below to dissatisfaction with the agencies' handling of "protracted cases" does not support the court's position. (App. A, pp. 24a-25a, *infra.*) The Committee on Rule Making of the Administrative Conference of the United States in its report on ratemaking made important suggestions for the improvement of adjudicatory procedures, which is the direction in which reform properly lies.[11] That committee rejected the idea of action by fiat,

[10] Whatever "malaise" may exist in the administrative process arises not from giving regulated firms the procedural rights prescribed for them by Congress, but rather from the failure of some agencies to develop rational standards that would lead to consistent, fairly predictable decisions, instead of unarticulated shifts of policy on an *ad hoc* basis. See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 1055, 1263 (1962).

[11] Administrative Conference Committee on Rule Making, *Improvement in the Conduct of Federal Rate Proceedings*, S. Doc. No. 24, 88th Cong., 1st Sess. (1963); Cramton, *Some Modest Suggestions for Improving Public Utility Rate Proceedings*, 51 Iowa L. Rev. 267 (1966). See also Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision-Making to Hearing Examiners*, 48 Minn. L. Rev. 823 (1964); Jones, *Licensing of Domestic Air Transportation*, Part I, 30 J. Air L. & Com. 113 (1964), Part II, 31 J. Air L. & Com. 89 (1965); Nathanson, *Looking Backward, 2000-1963: A Personal View of the Administrative Conference, 1961-62*, 16 Ad. L. Rev. 33 (1963); Ross, *The Big Administrative Proceeding: A Response to Mr. Westwood*, 51 A.B.A.J. 239 (1965). Contrary to the disparaging view of administrative adjudication expressed by the court below, many leading commentators have stressed the value and importance of adjudication in the development, as well as the application, of agency

exactly what the Board did here. Administrative Conference Committee on Rule Making, *supra* note 11, at 80-81; Cramton, *supra* note 11, at 272-73. And the confinement of action by fiat to action affecting "classes" of licensees is an illusory limitation, as shown by what has developed in this case: the favored class today consists of a single carrier. Airlift International, now the only other domestic all-cargo carrier, does not compete with Flying Tiger and has not instituted a blocked space rate.

(d) Petitioners' objection to the Board's proceeding by fiat is not, as the court below would have it, "a broad conceptual demand for an adjudicatory-type proceeding," made, as the court implies, solely in the interest of delay and without any proffer of what would be proved on an evidentiary record. (App. A, p. 29a, *infra*.) The purported factual justifications for the Board's policy statement appeared only when the policy statement itself was finally issued at the end of the so-called rulemaking proceeding. There was no opportunity to offer the data that would disprove them.

Every significant fact that the Board found or conclusion that it reached in its policy statement was subject to refu-

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policy. See, *e.g.*, Auerbach, *Some Thoughts on the Hector Memorandum*, 1960 Wis. L. Rev. 183; Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 Wis. L. Rev. 95; Cary, *Why I Oppose the Divorce of the Judicial Function From Federal Regulatory Agencies*, 51 A.B.A.J. 33 (1965); Cohen & Rabin, *Broker-Dealer Selling Practice Standards: The Importance of Administrative Adjudication In Their Development*, 29 Law & Contemp. Prob. 691 (1964); Kintner, *The Current Ordeal of the Administrative Process: In Reply To Mr. Hector*, 69 Yale L.J. 965 (1960); Loevinger, *The Administrative Agency As a Paradigm of Government—A Survey of the Administrative Process*, 40 Ind. L.J. 287 (1965); Massel, *The Regulatory Process*, 26 Law & Contemp. Prob. 181 (1961). See also Davis, *Separation of Judicial Functions of Administrative Agencies*, 26 ICC Prac. J. 773 (1959); Elman, *Agency Decision-Making: Adjudication By the Federal Trade Commission*, 19 Food Drug Cosm. L.J. 508 (1964); Nathanson, *American Administrative Law*, 6 J. Soc'y Pub. T.L. (N.S.) 39 (1961).

tation. The Board's "findings," stated in the most conclusory of terms, concerned matters that are typically the subjects of licensing or ratemaking proceedings had upon an evidentiary record. Among other things, the Board said that blocked space service promised a breakthrough into cargo traffic that now moves on surface carriers, that there was probably not enough such traffic to go around among all the air carriers and that to give the all-cargo carriers a blocked space monopoly would strengthen them while at the same time the combination carriers would not be injured in any important way because (1) there would be a shift of small-package business to them and (2) the general increase in traffic brought about by blocked space rates would inure to their benefit.[12] To suggest, as the lower court appears to do, that such issues are not enlightened by evidentiary hearings is to betray a cynicism about the hearing process that mocks the principal business of the great regulatory agencies. And in this instance, given the opportunity for normal hearing procedure, it is certain that helpful light would have been shed on critical issues of fact and economics, including light that would have come from shippers and other important community interests. They, in the end, have the greatest stake in healthy and fair competition in the transport system; they never had a chance to be heard at all.

The court below focused on one issue that would have been raised by the combination carriers had they had the opportunity, the effect that excluding them from blocked space service would have upon their business. The court said that when the combination carriers are able to prove injury "based in significant measure on actual relevant

[12] A number of the propositions advanced by the Board in support of the all-cargo carrier monopoly of blocked space service are belied by the currently effective Flying Tiger tariff. Under it, for example, there is no reason for a shift of small-package business to the combination carriers; and rates just 3% below ordinary rates will not produce any breakthrough or general increase in traffic. (See *supra*, pp. 13-14.)

experience, they will have a remedy available to vindicate their asserted rights, both before the Board and on judicial review in case of dissatisfaction with the Board's action or inaction." (App. A, p. 31a, *infra.*) But the basis for review of an agency's refusal to entertain a proposed amendment of a rule is—to say the least—slippery if not illusory.[13] In any event, unlawful agency action cannot be upheld on the ground that unspecified means are available for unspecified relief after injury has been consummated. The ratecutting weapon in Flying Tiger's hands is a potent one that can be rapidly wielded.

2. Despite the Board's and the lower court's treatment of the problem in this case as one of determining the carriers' authority, it may be said with reason that in essence the Board was undertaking to regulate rates. As we have seen, the uniqueness of the so-called blocked space "service" defined in the Board's policy statement lies only in the permissible rate discount. Rates, however, are regulated by the Board not under its licensing powers but under other sections of the Act, as it has insisted heretofore.[14] As rate

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[13] *Cf.* Nolde & Horst Co. v. Helvering, 122 F.2d 41, 44 (D.C. Cir. 1941); Dow v. Ickes, 123 F.2d 909, 913 (D.C. Cir. 1941), *cert. denied*, 315 U.S. 807 (1942); Crooker v. SEC, 161 F.2d 944 (1st Cir. 1947); NLRB v. Tennessee Prods. & Chem. Corp., 329 F.2d 873 (6th Cir. 1964), *cert. denied sub nom.* Clower v. NLRB, 379 U.S. 833 (1964); Minnesota v. United States, 238 F. Supp. 107 (D. Minn. 1965); Amendment of Section 3.606, Table of Assignments, Television Broadcasting Stations (Champaign, Ill.), 16 P. & F. Radio Reg. 1634b, 8 Ad. L.2d 870 (1958); In re Potomac Broadcasting Corp. (WPIK), 6 P. & F. Radio Reg. 559, 564 (1950).

[14] When carriers sought certificates for "coach" service, as if such service was something separate from general air service for licensing purposes, the Board held that "air-coach service involves a decision as to the appropriate pricing of one of the natural products of air line operation. Basically this poses, not a new route or new service problem, but a rate problem—a decision as to what fares should be charged." Transcontinental Coach-Type Service Case, 14 C.A.B. 720, 722 (1951).

regulation, the Board's action is palpably illegal, which is no doubt a reason that the Board did not so treat its action. (*Supra,* pp. 18-19.)

(a) Section 404 of the Federal Aviation Act imposes upon carriers the duty of maintaining rates that are reasonable and non-discriminatory. That duty is enforced by the Board under Section 1002, which provides for investigations of rates on evidentiary records, cancellation if they are found unlawful and the prescription of lawful rates. Section 1002 also allows the Board to suspend rates shown in tariff changes but only for a maximum period of 180 days and only for the purpose of holding an investigation of the lawfulness of the rates. Section 403 requires the filing and observance by the carriers of tariffs showing their rates and empowers the Board to reject tariff changes that do not comply with regulations issued under Section 403(a) prescribing the contents, form and manner of filing and publication of tariffs. Nothing in Section 403 gives the Board power to reject tariffs because the rates shown are not in accord with substantive rate standards.[15] These provisions of the Federal Aviation Act are in a familiar pattern also found in the several parts of the Interstate Commerce Act. *E.g.,* §§ 216-17, 49 Stat. 558 (1935), *as amended,* 49 U.S.C. §§ 316-17.

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[15] Section 403(a) authorizes the board to reject tariffs that are not in conformity with the section or with regulations issued under the section. At the time of the rejection of petitioners' tariffs, the tariff regulations under § 403(a) did not provide for rejection of a tariff showing rates for a service a carrier was not authorized to perform. The regulations have since been amended so to provide. 14 C.F.R. § 221.7 (1966).

In Charter Flight Tariff Investigation, 15 C.A.B. 921 (1952), *aff'd sub nom.* Flying Tiger Line v. CAB, 204 F.2d 404 (D.C. Cir. 1953), the Board used the statutory evidentiary investigation procedure to determine that a tariff should be cancelled because of a carrier's lack of authority to provide the service the tariff covered, which was the basis for the rejection of petitioners' tariffs in the present case.

The Court of Appeals for the Third Circuit in *Mississippi River Fuel Corp.* v. *FPC*, 202 F.2d 899 (3d Cir. 1953), *cert. dismissed*, 345 U.S. 988 (1953), held, under analogous provisions of the Natural Gas Act, that an agency may not reject tariffs as a means of enforcing rate regulation standards or policies. If the Board's action is viewed as attempted rate regulation by tariff rejection, the decision below squarely conflicts with that decision of the Third Circuit.

(b) The Board's action is explicitly designed to prevent carriers, authorized to compete with each other, from competing "on an equal footing"—as the Board's dissenting members said. (R. 149, J.A. 85, quoting from *Air Freight Case*, 10 C.A.B. 572, 603 (1949).) The petitioners are subjected, in effect, to a minimum rate—the regular rate level; their competitor, Flying Tiger, is permitted to carry freight at rates below that floor.

This matter is dealt with in the most cavalier fashion by the court below. After recognizing that "competitors in a regulated industry should be treated similarly in rate rulings in order to preserve competition" the court contented itself with asserting that nonetheless carriers may be reasonably classified and different rates authorized for the different classes. Its authority, significantly, was "See generally" the *Storer* and the *National Broadcasting* cases. (App. A, pp. 17a-18a, *infra*.)

It need hardly be said that the *Storer* and *National Broadcasting* cases had nothing whatever to do with rate regulation or with the classification of persons regulated. But there are pertinent precedents; and they condemn the stand of the court below. Those are the precedents to which we have already referred, bearing this Court's authority, *supra* p. 19, which hold that in rate regulation different requirements for competitors, even intermodal competitors, can be allowed only upon specific evidence and findings pertinent to rate questions—that is, evidence, and findings

based on the evidence, as to differing costs, movement of traffic, inherent advantages enjoyed by the carrier or carriers in question, and so on. Given rates within the zone of reasonableness, competitors are free to compete. The Board itself has stated the principle forcefully: "It is a fundamental rate-making principle that once a rate level is established . . . all the carriers are free to meet that rate." CAB Order No. E-20543, March 6, 1964, p. 3. That principle is shattered by the Board's decree here that, without an examination of the lawfulness of the petitioners' tariffs under substantive rate regulation standards, it will refuse to accept them but will at the same time allow a competitor to publish the reduced blocked space rates.

3. If, contrary to this Court's precedents and what we have said above, the Board was empowered to act as it has by rulemaking to achieve its policy goal of eliminating or reducing competition for volume freight shipments, the rulemaking procedure it followed was bound to comply with Section 4 of the Administrative Procedure Act. It did not.

The court below said that "the procedure followed by the Board admittedly complies fully with the requirements for rule making established in section 4 of the Administrative Procedure Act . . .." (App. A, p. 15a, *infra.*) The statement is inaccurate. The procedure the Board followed was as we have described it, and petitioners did not admit that it complied with Section 4. As they consistently asserted, it was in blatant violation of Section 4.

Section 4(a) requires notice of proposed rulemaking; that notice must include either the terms or substance of the proposed rule or a description of the subjects and issues involved and a reference to the authority under which the rule is proposed. Section 4(b) requires that after notice as required by Section 4(a) there be an opportunity for interested persons to submit written data, views or argument. The requirements are inapplicable to "general statements of policy."

The Board's "general statements of policy," denominated "Statements of General Policy," are included in Part 399 of its Regulations. 14 C.F.R. §§ 399.1-.91 (1966). Section 399.4, one of the introductory provisions of this Part, states that "changes in policy may be made with or without advance notice to the public . . ." This is consistent only with the view that the remaining provisions of Part 399 are intended as guidance to interested persons, see § 399.1, and not as rules of law. This indeed has been the Board's practice.[16] In this prior practice the Board followed the concept of the policy statement enunciated in the authoritative Attorney General's Manual on the Administrative Procedure Act (1947). In its discussion of Section 4, the Manual offers a "working" definition of "general statements of policy" as distinguished from "substantive rules" and "interpretative rules"—"statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." P. 30 n. 3.

Thus when the notice of rulemaking in this case specified that an amendment to Part 399 was proposed, it was not notice that a substantive rule was contemplated. Only one brief paragraph of the notice discussed the blocked space proposal; it said only that there would be benefit to all-cargo carriers and to combination carriers if the former

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[16] CAB Order No. E-12191, Feb. 19, 1958, dismissed a motion to review a staff dismissal of a complaint charging violation of the Transatlantic Charter Policy, a provision of Part 399; the CAB dismissed the motion on the ground that "failure to comply with the terms of the Policy could not be regarded as a violation of any regulation . . ." Another provision of Part 399, § 399.33 (a), sets forth the conditions under which the Board allows off-peak reduced fares. In two cases where tariffs were filed raising questions as to compliance with the off-peak policy the Board did not reject the tariffs but conducted regular rate investigations and finally determined the legality of the tariffs with ultimate reference to the statutory rate standard; it did not treat the policy statement as a substantive regulation. Delta Off-Peak Coach Fares, CAB Order No. E-20268, Dec. 16, 1963; American Airlines Off-Peak Coach Service, 28 C.A.B. 25 (1958).

were permitted to sell blocked space to the latter. (R. 186, J.A. 122.) And the specific proposal in the policy statement was a single sentence, headed "pooling arrangements of certificated air carriers," saying merely that it "is the policy of the Board" to permit wholesaling of space by the all-cargo carriers to the combination carriers. (R. 192, J.A. 128.) No statutory authority was cited. (Other portions of the notice dealt with important substantive amendments to the Board's charter regulations, which are in another part of the Regulations and are enforceable as substantive rules of conduct.)

After written comments were received a notice of argument was issued. With no explanation this notice broadened the proposed policy to include approval of the sale of blocked space to shippers, including forwarders, by the all-cargo carriers—but still it was only a proposed Statement of General Policy. (R. 201-04, J.A. 137-40.) Even in the end the Board spoke in the statement it finally issued only in terms of its policy. (R. 144, J.A. 80.)

Such a statement of policy has a place in agency administration. Policy rules, as Judge Friendly and other students, including the Committee on Rule Making of the Administrative Conference in its report on ratemaking, have said, can contribute to the coherence of agency process.[17] They serve to put the public on notice as to the agency's views in its administration of provisions concerning pooling (such as Section 412 of the Federal Aviation Act), ratemaking, acquisitions and mergers and so on.

And even after the adoption of the statement of policy the Board treated it as precisely that. It made the policy statement effective immediately without finding or stating any "good cause" for immediacy, even though Section 4(c) of the Administrative Procedure Act requires that "any substantive rule" (with an exception for "statements of

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[17] See, *e.g.*, Administrative Conference Committee on Rule Making, *supra* note 11, at 113; Cohen & Rabin, *supra* note 11, at 1296-97; Fuchs, *Agency Development of Policy Through Rule-Making*, 59 Nw. U.L. Rev. 781 (1965).

policy") be published no less than 30 days before its effective date unless good cause for an earlier effective date is "found and published with the rule." Further, the Board suspended the tariff of the petitioner United, as it ordinarily would a tariff that raised a policy question, and included United's tariff in the rate investigation where its lawfulness would be determined by the statutory criteria. (R. 156-58, J.A. 92-94.)

But then in the Board's order reversing itself on the tariff suspensions, and determining that the tariffs should be rejected, the Statement of General Policy became something quite different. (R. 158-60, J.A. 94-96; App. C, pp. 42a-44a, *infra*.) It became a definitive statement of the carriers' authority, a rule of law.

Such a regulation can be adopted, under Section 4, only after notice and opportunity for written comment. It is plain that those requirements were not complied with. The original notice spoke only of a policy to "encourage" a species of pooling between all-cargo and combination carriers. After written comments, oral argument was noticed on that question and the further question whether policy should be to permit sale by the all-cargo carriers of blocked space to shippers. There was no opportunity for written comments on that further question. All that was allowed the combination carriers was 45 minutes of oral argument. (Unprinted Tr. 1882.) Thereafter the policy statement adopted dealt not only with the policy of permitting the all-cargo carriers the privilege indicated but also with the denial of the privilege to the combination carriers. And then what had been proposed and processed and treated even after its adoption, in the suspension of United's tariff, as a policy statement not subject to Section 4, became, with the tariff rejection, a substantive rule—which had been adopted without complying with Section 4.

This Court lately affirmed a three-judge court's decision that action of the ICC must be set aside for failure to comply with the notice requirements of Section 4, where the

Commission had a proceeding to determine the legality of the application of a previously-prescribed general rule to specified situations and concluded, without formal notice that it intended to do so, by repealing the rule. *Chicago, B. & Q. R.R.* v. *United States,* 242 F. Supp. 414 (N.D. Ill. 1965), *aff'd per curiam,* 382 U.S. 422 (1966). There it was argued on behalf of the agency, as it was argued to the court below in this case, that there was abundant prior actual notice to the persons complaining of the sweeping action the agency finally took. The three-judge court held that notice could not be ascribed to the plaintiffs because of their mere participation in the limited proceeding and added, "Parties to proceedings cannot be expected to grope through the litigation." *Id.* at 417.

Whatever may be the proper role of rulemaking in the disposition of interests and issues as large as those involved in this controversy, this Court should determine whether there should be countenanced a procedure so ill-calculated as the procedure followed here to notify interested persons of what was afoot and to provide the Board with the data and insights it needed. At stake, to take only the interests of the combination carriers and leaving aside those dependent on their cargo services, including important cities and shippers not even served by Flying Tiger, was the investment of more than $400,000,000 they already had made in all-cargo service, and the hundreds of millions more they were and are in the process of making. This investment has been built up in 22 years of promotion by them of the all-cargo business, under a regulatory regime in which the Board has been at pains to foster competition "on an equal footing" between all the carriers, combination and all-cargo alike. (R. 146-51, J.A. 82-87.)

Agency procedure has been of a far different and more responsible kind in the cases where this Court has upheld the validity of rules that have affected vital interests. In *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), 73 days of public hearings had been held, with 96 witnesses, before the chain-broadcasting rules were promulgated. In *American Trucking Ass'ns* v. *United States,*

344 U.S. 298 (1953), 80 witnesses were heard in evidentiary proceedings before the ICC's tripleasing rules were promulgated. The multiple ownership rules in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), were based on insights gained in a series of adjudicatory proceedings and full-scale rulemaking complying with Section 4 of the Administrative Procedure Act. In *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964), the issue of escalation clauses in natural gas contracts had been the subject both of adjudication and a proper Section 4 proceeding.

Here there was nothing but the 45 minutes of oral argument allowed to the combination carriers—and even that was after a notice of argument specifying only one side of the coin.

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue.

Respectfully submitted,

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